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No. 86-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioner,

—v.—

BALTIMORE ORIOLES, INC., ET AL.,

Respondents.

STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Associated Actors and Artistes of America—AFL-CIO (the "Four A's") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petition

of the Major League Baseball Players Association ("MLBPA"), Stephen D. Rogers, Steven Renko, Jr. and Robert R. Boone (collectively referred to herein as the "Players") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.* This motion is necessitated by the refusal of counsel for respondents, The Commissioner of Major League Baseball, The National League of Professional Baseball Clubs, The American League of Professional Baseball Clubs, the Major League Baseball Promotion Corporation and the Major League Baseball Owners (collectively, "the Owners" or "the Clubs") to grant permission to file such *amicus* brief. The brief of the Four A's, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The Four A's is an association composed of the following organizations: Actors' Equity Association; American Federation of Television & Radio Artists; American Guild of Musical Artists; American Guild of Variety Artists; Asociación Puertorriqueña de Artistas y Tecnicos del Espectaculo; Hebrew Actors' Union, Inc.; Italian Actors Union; Screen Actors Guild; and Screen Extras Guild, Inc. The Four A's and its member organizations represent the interests of more than 123,000 actors, artists and others involved in the dramatic and performing arts. The representation provided by *amicus* and its constituent organizations to their respective members involves such matters as assisting in contract negotiations and dispute resolution, and monitoring legislative and judicial developments of import.

In its capacity as representative of the interests of numerous performing artists, *amicus* is deeply concerned over the development and preservation of intellectual property and other

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* The opinion of the court of appeals is reported at 805 F.2d 663 (7th Cir. 1986) and appears as Appendix A to the Players' petition.

rights which will impact upon the livelihoods of its constituents' members. Both the copyright laws and state right of publicity laws play prominent roles in the professional lives of the members of *amicus*' constituent organizations. Where, as here, a legal precedent emerges that can severely damage individuals involved in the dramatic and performing arts, *amicus* is constrained to express its views concerning such precedent.

The *amicus* brief conditionally filed herewith explains why *amicus* believes that the Seventh Circuit's decision is fundamentally incorrect, and how this erroneous decision will negatively impact upon the dramatic and performing arts. It is therefore respectfully requested that *amicus*' motion for leave to file the annexed brief be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, AS *AMICUS CURIAE*

Preliminary Statement

The Associated Actors and Artistes of America—AFL-CIO (the "Four A's") submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners, the Major League Baseball

Players Association, Stephen D. Rogers, Steven Renko, Jr. and Robert R. Boone (collectively referred to herein as the "Players").

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Summary of Argument

The Seventh Circuit committed two fundamental errors in holding that the Players' state-created publicity rights are preempted under the 1976 Copyright Act by reason of the televising of Major League Baseball games: first, it concluded that the right of publicity is a right "equivalent" to copyright; and second, it determined that the Players sought to exercise their publicity rights in copyrightable works of authorship.

Not only do these conclusions wreak havoc with established copyright doctrine; they also threaten to strip away an essential element of property protection afforded to many other individuals—such as those engaged in the dramatic and performing arts—who by reason of personal attributes and achievements have earned the right to "reap the reward of [their] endeavors." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977).

Argument

I.

The Right of Publicity Is A Right Separate and Distinct from Copyright

The right of publicity protects the intangible qualities that make each performer unique. The rights protected pursuant to the federal copyright scheme, 17 U.S.C. § 101 *et seq.* ("the Copyright Act" or "the Act"), protect the tangible fruits of an individual's labor. These two forms of legal protection complement one another; they neither clash nor provide for duplicative protection.[1]

To be subject to preemption under Section 301(a) of the Copyright Act,[2] the right of publicity would have to be shown to be "equivalent" to one or more of the exclusive rights conferred on copyright owners by Section 106 of the Act.[3]

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1 This is not to say that the right of publicity and copyright bear no resemblance, but merely that they protect and further different interests. *See generally Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

2 Section 301(a) of the Copyright Act provides in relevant part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).

3 Section 106 provides a copyright owner with the following exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;

(footnote continued on following page)

Prior to the rulings in this case, no court had found such an equivalence.[4] This is not surprising in light of the fundamentally disparate nature of the right of publicity in relation to the interests sought to be fostered by the copyright laws.

The right of publicity is a personal right that, in certain jurisdictions, does not even survive death. *See, e.g., Factors Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). It is primarily concerned with an individual's proprietary interest "to reap the reward of his endeavors," *Zacchini*, 433 U.S. at 573, by exploiting those attributes and achievements that have proven of value. The right is only tangentially concerned with a larger benefit to the public.

The copyright laws, in contrast, are designed to foster creative works of authorship—such as books, plays and musical compositions—principally for the public benefit. As this Court noted in *Sony Corporation of America* v. *Universal City*

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(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106.

4 All other courts addressing this issue have concluded that the right of publicity is *not* preempted by the copyright laws. *See, e.g., Bi-Rite Enterprises, Inc.* v. *Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983); *Factors Etc., Inc.* v. *Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Apigram Publishing Co.* v. *Factors Etc., Inc.*, No. C 78-525 (N.D. Ohio July 30, 1980).

This conclusion is further supported by the legislative history of the Act, which clearly contemplates the continued vitality of the right of publicity. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 129-33 (1976).

Studios, Inc., 464 U.S. 417, 429 (1984), the copyright laws are not "primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Accord Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (quoting *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932)).[5]

For dramatic and performing artists, continued judicial recognition of these distinctions is of critical importance. For such artists create personae of significant commercial value, the exploitation and protection of which transcend the bounds of the copyright law. Publicity rights are, moreover, personal to the artist: the owner of a strip of celluloid simply cannot, under the authority of the copyright laws, deprive an artist of his or her ability fully to exploit such publicity rights.

The Seventh Circuit nevertheless found there to be "equivalence" between publicity rights and rights within the scope of the copyright law based upon the following circuitous reasoning: "Because the exercise of the Clubs' right to broadcast telecasts of the games infringes the Players' rights of publicity in their performances, the Players' rights of publicity are equivalent to at least one of the rights encompassed by copyright, *viz.*, the right to perform an audiovisual work." 805 F.2d at 677.

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5 Consistent with these observations is the recognition that an artist must establish different elements to prevail on a cause of action for invasion of his right of publicity than he would if he were to assert a copyright claim. In order to prevail on a cause of action for copyright infringement, a plaintiff must establish ownership of a copyright and copying of the copyrighted work by the defendant. Since direct evidence of copying is rarely available, the "copying" element of this cause of action is often established by proof of substantial similarity and access. *See* M. Nimmer, *Nimmer on Copyright* § 13.01, at 13-3 to 13-8.

In contrast, when a plaintiff brings suit to protect his right of publicity he must establish the elements of such cause of action as set forth in a state statute governing such rights or as established by state common law. In New York, for example, to prevail on a right of publicity theory, a plaintiff must establish that his name, portrait or picture has been used for advertising or trade purposes without his consent. N.Y. Civ. Rights Law § 51 (McKinney 1976 & Supp. 1987).

The court's analysis, however, does not resolve the issue. Although the Owners' exercise of their telecast copyright rights may have resulted in a violation of the Players' state law rights, this does not establish "equivalence" within the meaning of Section 301 of the Copyright Act any more than such exercise would preempt state law rights as "equivalent" if the telecast were to violate an individual's privacy rights or defame an individual. The court erred in failing to recognize that it was the Players' assertion of publicity rights in the likenesses and performances underlying the copyrighted telecasts which prevented the Owners from incorporating such likenesses and performances into the telecasts in the first instance. As *amicus* reads the record, the Players have never claimed any rights in the telecasts themselves, and hence no "right to perform an audiovisual work," contrary to the implications of the court's decision.

Indeed, in reaching its determination as to equivalence, the Seventh Circuit made no effort to analyze the elements of the copyright cause of action, on the one hand, and a right of publicity cause of action, on the other. Had it undertaken such an analysis, it simply could not have reached the conclusion it did.

II.

A Likeness or Performance Is Not A Copyrightable Work

The performance of a dramatic artist is not itself a tangible work, although others may preserve the artist's likeness and performance on film. The Seventh Circuit has nevertheless reasoned that, once embodied in a copyrightable telecast, a likeness or performance itself not only becomes copyrightable but, in fact, is subject to control by the owner of the telecast copyright.

The Seventh Circuit used the fact that game telecasts "are copyrightable works . . . because of the creative contributions of the individuals responsible for recording the Players' per-

formances," 805 F.2d at 676, to support its conclusion that the Players' likenesses and performances became copyrightable when recorded. But the court's assumption is nowhere supported by legal precedent. If the Players' likenesses and performances themselves are not independently entitled to copyright protection (which they are not, *see* M. Nimmer, *supra*, § 1.01[B][1] at 1-14.3 n.49), then their mere embodiment in a physical object entitled to such protection will not change their non-copyrightable status. It is likewise fundamental that the copyright protection afforded the owners of copyrightable telecasts extends solely to their creative contribution, and not to any of the additional or underlying elements captured by the telecasts.[6]

In the instant case, what was presumably copyrightable by the Owners was the manner in which the games and the performances taking place therein were telecast and recorded, *i.e.*, the camera angles and shot selection involved in producing the broadcast of the game. In such circumstances, the requisite "intellectual labor may be found in the production aspects of the broadcast, *e.g.*, the choice of the particular picture broadcast, and the selection of lighting and angle." Comment, *Copyright Protection for Live Sports Broadcasts: New Statutory Weapons with Constitutional Problems*, 31 Fed. Comm. L.J. 277, 285 (1979). The copyrightability of such telecast would derive not from the evanescent performances of the baseball players, but from the creative input of those who captured what is itself a non-copyrightable event. M. Nimmer, *supra*, § 1.08 [C][2] at 1-51.

The Seventh Circuit's failure to recognize these fundamental distinctions could wreak havoc in the performing arts industry. By the court's logic, anyone who happens to film the perform-

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6 This basic premise underlies the entire copyright scheme. *See, e.g.*, 17 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").

ance or an actor or other performing artist thereby can control any and all exploitations of the performance captured on film. Apart from directly contravening settled authority,[7] such a result would be plainly absurd. The performer could not, in such circumstances, turn to the copyright laws for protection. For he or she would not own a tangible work which had been "copied." The state-law remedy for such piracy—and that which today prevents it from occurring—is an action for violation of one's publicity rights. But if those rights are taken away through misapplication of copyright preemption doctrine, the value to a performing artist of his likeness and performance will stand greatly diminished. In such event, the very vitality of the performing arts will be threatened, with potentially significant adverse consequences for this nation's entertainment industry.

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7 *See, e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Republic Pictures Corp.* v. *Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954); *Autry* v. *Republic Productions, Inc.*, 213 F.2d 667 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954).

Conclusion

Since the right of publicity is not equivalent to the protections afforded by copyright, and since the Players' likenesses and performances are not themselves copyrightable works, the provisions of Section 301(a) of the Copyright Act should not preempt the Players' exercise of their publicity rights. To protect against the destructive effects which the Seventh Circuit's ruling is likely to have upon performing artists and others, *amicus* respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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